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No. 87-69

In the Supreme Court of the United States

OCTOBER TERM, 1987

SACILOR, ACIERIES ET LAMINOIRS DE LORRAINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether foreign steel producers who had contracted to sell steel pipe to a United States customer have standing to challenge the Secretary of Commerce's decision not to allow imports of steel pipe above the level specified in an international agreement.

2. Whether these foreign steel producers' challenge to the Secretary's decision is mooted by the fact that the United States customer has subsequently satisfied its need for such steel pipe and, by virtue of the force majeure provision of their contract, rendered the prior obligations between it and the foreign steel producers null and void.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 815 F.2d 1488. The opinion of the Court of International Trade (Pet. App. 10a-22a) is reported at 613 F. Supp. 364.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 31, 1987. On June 19, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 13, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1984, as part of an overall effort to protect the domestic steel industry from foreign imports, Congress enacted the Steel Import Stabilization Act (SISA), Pub. L. No. 98-573, Tit. VIII, 98 Stat. 3043

(19 U.S.C. (Supp. III) 2253 note). Section 805(b)(1) of SISA (98 Stat. 3045) instructs the Secretary of Commerce to limit the quantity of steel pipe and tube imported annually into this country to the amounts set forth in a 1982 agreement between the United States and the European Economic Community (EEC). Section 805(b)(3) (98 Stat. 3046) permits the Secretary to allow additional imports of specific steel products when he finds that such products are in "short supply" in the United States or that "emergency economic situations" exist.

In light of the enactment of SISA, the United States and the EEC in January 1985 exchanged an additional set of letters in which they clarified their 1982 agreement (Pet. App. 3a). Under the agreement as thus clarified, the EEC pledged to restrain the export of steel pipe to the United States to a level equal to 7.6% of this Nation's apparent consumption during 1985 and 1986, and to use export licenses as the means of imposing this restraint (*ibid.*). The United States, in turn, agreed that the Secretary of Commerce would allow the importation of additional steel pipe and tube upon appropriate request by the EEC if a "short supply" or "emergency market situation" existed in the United States (*id.* at 4a).

Pursuant to Section 805(b)(3) and the clarified agreement, the EEC requested, in January 1985, that the Secretary find that a "short supply" existed for the steel pipe needed by the All-American Pipeline Company (AAPL) to construct a crude oil pipeline from California to the Gulf Coast (Pet. App. 4a). The Secretary invited public comments on the EEC's "short supply" request (*ibid.*). After receiving and evaluating these comments, the Secretary, on March 28, 1985, denied the EEC's request, explaining that three United States steel companies had unused capacity exceeding the amount of pipe for which the EEC had requested "short supply" approval (*ibid.*)

2. Petitioners are three foreign steel producers who had previously contracted to supply pipe to AAPL. They

instituted this action in the Court of International Trade, alleging that the Secretary's denial of the EEC's "short supply" request was arbitrary and capricious and a violation of their due process rights (Pet. App. 4a, 14a). While the case was pending before that court, the United States and the EEC amended their 1985 agreement to admit an additional 100,000 tons of imported pipe for the AAPL project (*ibid.*). Following the negotiation of that amendment, the Court of International Trade rejected petitioners' challenge to the Secretary's earlier "short supply" decision (*id.* at 10a-22a). It ruled that neither the SISA nor the January 1985 agreement between the United States and the EEC "establish[es] direct, affirmative, and judicially enforceable rights for private parties in the position of [petitioners]" (*id.* at 16a). The court emphasized that the Secretary's decision was "in the foreign affairs arena" (*id.* at 20a (footnote omitted)) and it held that his decision was not subject to judicial review because "it is committed to agency discretion" by law (*id.* at 21a). The court also rejected petitioners' due process claim (*id.* at 21a-22a).

3. Petitioners filed a notice of appeal to the Federal Circuit. While the appeal was pending, AAPL purchased from other sources the pipe that it needed for the pipeline project; the parties thereupon notified the court that, pursuant to the force majeure clause in petitioners' contract with AAPL, all prior obligations between petitioners and AAPL had been rendered null and void (Pet. App. 4a). In light of these events, the United States renewed its argument that petitioners were without standing to challenge the Secretary's denial of the EEC's short-supply request and, in addition, suggested that petitioners' appeal had become moot (*id.* at 6a). The Federal Circuit agreed with the United States on both counts; it therefore found it unnecessary to address the trial court's holding that the Secretary's decision was nonreviewable (*id.* at 9a).

First, the Federal Circuit ruled that petitioners lacked standing to challenge the Secretary's denial of the EEC's short-supply request (Pet. App. 6a-8a). With respect to the constitutional elements of standing doctrine, it found that, even "[a]ssuming that [petitioners] ha[ve] sustained the required injury-in-fact," "it is not clear that relief would be likely to follow from a favorable decision in this case" (*id.* at 7a). The court pointed out that "AAPL is no longer obligated to purchase [petitioners'] pipe" and that, "[e]ven if such an obligation existed, export of the pipe would be contingent on receipt from the EEC of the necessary export licenses" (*ibid.*). The court found "nothing in the record * * * indicating that the EEC would issue the licenses to [petitioners]" (*ibid.*). Moreover, with respect to the prudential elements of standing doctrine, the court found that, "[a]lthough [petitioners'] interests are arguably regulated by section 805(b)(3) of the SISA, it does not appear that Congress intended to rely on foreign manufacturers to challenge administrative application of American import laws" (Pet. App. 7a). On the court's view, "it would be contrary to the entire purpose of the Act to allow foreign producers to challenge a decision made pursuant to a regulatory scheme designed to protect American steel producers from foreign imports" (*id.* at 8a).

In the alternative, the court ruled that petitioners' challenge to the Secretary's denial of the EEC's short-supply request had become moot (Pet. App. 8a-9a). "The goal of th[is] suit," the court explained, "was to allow [petitioners] to export pipe to the United States to fulfill [their] obligation to AAPL"; since AAPL had subsequently purchased the required pipe from other sources, thus voiding petitioners' contracts, the court concluded that "there is no live case or controversy to be resolved by [this] suit" (*id.* at 8a). The court refused to address petitioners' claim that "the possibility of recovery of money damages against the Secretary in a suit in the Claims Court on a Fifth

Amendment taking theory or in a district court under the Federal Tort Claims Act presents a sufficiently live controversy for this court to decide the present case[,]" noting that "[n]o such claims were presented to the trial court" and stating that it would "not render an advisory opinion on claims that were not or could not be raised below" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, this Court's review is not warranted.

1. Petitioners initially suggest (Pet. 7-11) that the decision below must be reviewed in order to assure this country's trading partners that they will not be subjected to arbitrary short-supply decisions and to prevent those trading partners from instituting retaliatory trade measures. But petitioners greatly exaggerate the need for judicial review of these matters. The United States and the EEC contemplated that disputes concerning short-supply decisions might arise, and they accordingly included in their pipe and tube agreements certain consultative procedures for resolving such disputes. Pursuant to those consultative procedures, the United States and the EEC in fact agreed, only two months after the Secretary had denied the EEC's original short-supply request, to admit 100,000 additional tons of EEC pipe for the AAPL project. See Pet. App. 4a. Thus, far from exhibiting a pressing need for further judicial review, the history of this case indicates that the United States and its trading partners are fully capable of resolving their disputes through the diplomatic process. Indeed, it was for this reason that the Court of International Trade held the Secretary's short-supply decision to be immune from judicial review at the behest of private parties like petitioners, a holding that the Federal Circuit found unnecessary to reach.

2. Petitioners next suggest (Pet. 11-16) that the Federal Circuit's judgment with respect to the mootness issue conflicts with a decision of the District of Columbia Circuit and with this Court's decisions involving administrative action that is "capable of repetition, yet evading review." This suggestion is without merit.

There is no conflict between the decision in *British Caledonian Airways Ltd.* v. *Bond*, 665 F.2d 1153 (D.C. Cir. 1981), and the decision here. In *British Caledonian*, various foreign airlines petitioned the District of Columbia Circuit for direct review of an order of the Federal Aviation Administration (FAA). The FAA rescinded the challenged order five weeks after it had been issued, and the government moved to dismiss the action as moot. The court of appeals rejected that argument, finding that the FAA's order was "typical of those capable of repetition yet evading review" (665 F.2d at 1157-1158).

Contrary to petitioners' statement (Pet. 14-16), the instant case does not fall within the exception to the mootness doctrine applied by the District of Columbia Circuit in *British Caledonian*. The principle that governmental action may be "capable of repetition but evading review" applies "only in exceptional situations" (*City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983)). Specifically, the challenged action must be such that it is "by nature short-lived" (*Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976)), and there must be a "reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Accord, *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979). The court in *British Caledonian* found that both of these conditions were satisfied in the circumstances involved there, which concerned an FAA order that was in existence for only five weeks (665 F.2d at 1157-1158). Neither condition, however, is satisfied in the present case.

First, there is nothing particularly "short-lived" about a decision by the Secretary to deny a short-supply request. Compare *DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974) (per curiam) (law school admission practices will not by their nature evade effective judicial review), with *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 546-547 (pre-trial publicity restraints by their nature evade effective judicial review); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973) (restrictions on means for aborting pregnancy by their nature will evade effective review). In deciding whether to grant an EEC short-supply request, the Secretary examines the market for steel pipe and determines whether a particular project can satisfy its needs from domestic sources. There is no reason to suppose that the market for steel pipe is so violatile that the Secretary will frequently have to change his short-supply decisions; to the contrary, the premise of the SISA and of the 1985 agreement between the United States and the EEC is that the Secretary can evaluate domestic suppliers' capacity with sufficient accuracy to ensure both the vitality of the domestic steel pipe industry and a sufficient supply of steel pipe for all domestic consumers. Thus, while further consultations between the United States and the EEC, or unforeseen changes in market conditions, may cause the Secretary occasionally to revise a short-supply decision, the mere possibility of revision does not provide sufficient basis for holding that the Secretary's action is by its nature so short-lived that it is "capable of repetition, yet evading review."

Indeed, it is difficult to see what relevance the doctrine of "capable of repetition, yet evading review," has to this case to begin with. Unlike the FAA order at issue in *British Caledonian,* the administrative decision at issue here—the Secretary's short-supply decision—has not expired; it remains subject to challenge by any party with a sufficiently adverse interest. Petitioners' challenge to that decision was not mooted by any action on the Secretary's part; rather,

it was mooted by the combined effect of AAPL's subsequent decision to satisfy its need for steel pipe from other sources and the operation of the force majeure clause in petitioners' contract with AAPL. Because of the idiosyncratic nature of the facts that have caused petitioners' claim to become moot, there is no reason to believe that the Secretary's short-supply decision is likely to "evade review" in the future.

In any event, petitioners have made no reasonable showing that they are likely to be subjected to this particular administrative action again. See *City of Los Angeles* v. *Lyons,* 461 U.S. at 109; *Murphy* v. *Hunt,* 455 U.S. at 482-483. The United States and the EEC have agreed to allow an additional 100,000 tons of foreign pipe to be imported into the United States for use on the AAPL project, and AAPL has now purchased all of the pipe that it needs to construct its pipeline. Furthermore, petitioners have not demonstrated that the EEC will make another short-supply request with respect to the AAPL project or, even if it does, that petitioners will be the foreign suppliers on whose behalf the EEC will choose to act. Hence, there can be no "reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Weinstein* v. *Bradford,* 423 U.S. at 149).

3. Finally, petitioners contend (Pet. 17-25) that the court below erred in finding that they lack standing to challenge the Secretary's denial of the EEC's short-supply request. Since this controversy is moot, the Court would be without jurisdiction to consider this contention. See *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987), slip op. 3-4. In any event, the contention is wrong.

As this Court has noted on many occassions, a plaintiff satisfies the constitutional elements of standing doctrine only by showing that it has suffered some concrete injury that is "fairly traceable" to the challenged action and "likely" to be redressed by a favorable decision. See, *e.g.*,

Allen v. *Wright*, 468 U.S 737, 751 (1984); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Here, "export of the pipe [was] * * * contingent on receipt from the EEC of the necessary export licenses" and "nothing in the record * * * indicat[ed] that the EEC would issue the licenses to [petitioners]" (Pet. App. 7a). Thus, as the court below held, petitioners did not show that their alleged injury—their inability to supply pipe to the AAPL project—was likely to be redressed by a decision in their favor.

Moreover, petitioners' claims would in any event be barred by the prudential limits that this Court has placed on challenges to agency action in the federal courts. To have standing to challenge agency action, a plaintiff must have an interest " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' " (*Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 6-7, quoting *Association of Data Processing Service Org.* v. *Camp*, 397 U.S. 150, 153 (1970)). "The essential inquiry," the Court has said, "is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law' " (*Clarke*, slip op. 10, quoting *Block* v. *Community Nutrition Institute*, 467 U.S 340, 347 (1984)).

Here, as the court below held (Pet. App. 7a-8a), it is clear that Congress did not intend to rely on foreign steel producers to challenge the Secretary's administration of the import quota statute. While foreign steel producers are indirectly regulated by the SISA, Congress enacted the SISA exclusively for the benefit of domestic steel purchasers and producers; as the court of appeals explained, "it would be contrary to the entire purpose of the Act to allow foreign producers to challenge a decision made pursuant to [the] regulatory scheme * * *." (*id.* at 8a). The statute provides for consultations between the govern-

ments of the United States and the EEC with respect to short-supply requests; it gives only the EEC (and not foreign exporters) the right to make such requests; and it does not refer to or attempt to protect foreign exporters in any way. In these circumstances, foreign steel exporters cannot reasonably be said to be within the "zone of interests" sought to be protected or regulated by SISA's statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectully submitted.

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